



U.S. Department of Justice

*United States Attorney
Eastern District of New York*

DCP/LHE/PTH
F. #2016R00505

*271 Cadman Plaza East
Brooklyn, New York 11201*

October 8, 2019

By ECF

The Honorable Brian M. Cogan
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Daniel Small, et al.
Criminal Docket No. 16-640 (BMC)

Dear Judge Cogan:

The government respectfully submits this letter to request that the trial of defendant Daniel Small in the above-captioned matter, which is currently scheduled to begin November 12, 2019 (the "Small Trial"), be adjourned until February 2020. The government further respectfully requests that the Court schedule a pretrial conference in December 2019. Small consents to the government's request for an adjournment.

On September 27, 2019, the Court entered an Order granting defendant David Levy's Motion for a Judgment of Acquittal and granting defendant Mark Nordlicht's Motion for a New Trial.¹ ECF Docket Nos. 799 & 800 (the "Order"). The Order vacated the jury verdicts finding Levy and Nordlicht guilty of Counts Six, Seven and Eight of the above-captioned Indictment, charging conspiracy to commit securities fraud, wire fraud conspiracy substantive securities fraud, respectively.² These counts were all related to Levy's and Nordlicht's involvement in the scheme charged in the Indictment as the "Black Elk Bond scheme." See Indictment ¶¶ 73-87. Together with Nordlicht, Levy and Jeffrey Shulse, Small is charged in Counts Six, Seven and Eight of the Indictment.

¹ The Order also conditionally granted Levy's Motion for a New Trial in the event that the Court's Order granting a Judgment of Acquittal was subsequently reversed.

² Defendant Jeffrey Shulse was severed from the other charged defendants by Order dated April 13, 2016. ECF Docket No. 331. Trial of Shulse is currently scheduled to begin on February 4, 2020. Small was scheduled to participate in the same trial of Nordlicht and Levy, but was severed by virtue of his counsel's unavailability for that trial.

The Order acquitted Levy on the grounds that the evidence presented at trial was insufficient to establish Levy's criminal intent. Order at 28. And, while the Court found the evidence sufficient to convict Nordlicht, see Order at 18-27, the Court granted him a new trial on the grounds that Nordlicht's conviction represented a manifest injustice, because the government presented insufficient evidence to show that Nordlicht: (1) knew Beechwood and Platinum were affiliates, Order at 34; and/or (2) intended to conceal that affiliate status from Black Elk's lawyer, Robert Shearer. Id. at 37. On October 4, 2019, the government filed Notices of Appeal from the Court's Order as to Levy and Nordlicht. As required, the government is currently preparing to seek the authorization of the United States Solicitor General to pursue its appeal.

At the Small Trial, the government's evidence will overlap substantially with the evidence presented at the trial of Nordlicht and Levy. Given this substantial overlap, any outcome of the government's possible appeal will have a significant impact on the conduct of the Small Trial. An adjournment of the Small Trial pending a decision on the government's appeal will serve the interests of the parties and the Court by allowing the various legal and factual issues under consideration on appeal to be resolved prior to the start of the Small Trial. Adjournment of the Small Trial will also serve the interests of judicial economy by minimizing the possibility of multiple trials of the same defendants.

The government anticipates that the process of seeking Solicitor General authorization to pursue its appeal will take several weeks. Accordingly, the government respectfully requests that the Court schedule a status conference for a convenient date in December 2019, at which time the government can update the Court and defendants Small and Shulse as to the status of its appeal. At that time, the parties can discuss the appropriate schedule for the Small and Shulse trials.

Respectfully submitted,

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cc: Clerk of the Court (BMC) (by ECF)
Defense counsel (by ECF)